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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 66

ANGHEL GOLDSTEIN, aka Andrei Pietraru, IULIU NASTA, aka Julius Nasta and GHEORGHE FUNDI, on behalf of themselves and all others similarly situated,

Appellants,

vs.

JOSEPH A. COX and SAMUEL DiFALCO, Surrogates of the County of New York, EDWARD F. SILVER, Surrogate of the County of Kings, CHRISTOPHER C. McGRATH, Surrogate of the County of Bronx, JOHN T. CLANCY, Surrogate of the County of Queens, ARTHUR LEVITT, State Comptroller,

Appellees.

On Appeal From the United States District Court
For the Southern District of New York.

PETITION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

Wolf Popper Ross Wolf & Jones,
By Martin Popper,
845 Third Avenue,
New York, New York 10022,
Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

ANGHEL GOLDSTEIN, *et al.*,

Appellants.

VS.

JOSEPH A. COX, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

PETITION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioners herein are attorneys-at-law, duly admitted to practice in all of the state courts of the State of New York, and three of them, including the undersigned, are admitted to practice before the Bar of the Supreme Court of the United States.

Petitioners are the attorneys for the Chiefs of the Consular Sections of the Embassies of the Union of Soviet Socialist Republics, Czechoslovakia, Hungary, Bulgaria and for the Consul General of Poland, in connection with their representation of the interests of their nationals who are legatees and distributees in estates in the City and State of New York. We also represent the Chief of the Consular Section of the Romanian Embassy in numerous estate matters in the City of New York. Petitioners also represent, under powers of attorney, the legal interests of

hundreds of legatees and distributees in estates in the City and State of New York who are nationals of the above-described countries and persons who are nationals of the German Democratic Republic and Albania.

The decision of this Court in this case will necessarily affect the legal interests of all of our above-described clients.

The complaint in this case challenges the constitutionality, on its face and as it has been applied, of Section 2218 of the Surrogate's Court Procedure Act of the State of New York as an invasion by the State of New York of the exclusive power of the Federal government to conduct foreign relations. Since 1951, petitioners have been involved in the presentation of this constitutional issue in the courts throughout the State of New York from the Surrogate's Courts to the Court of Appeals, the highest Court of the State. Petitioners first raised this issue before this Court in 1953, *Matter of Braier*, 305 N. Y. 148, 691 (1953), *appeal dismissed sub nom.; Kalmane* v. *Green*, 346 U. S. 802 (1953).

Subsequent to the decision in *Zschernig* v. *Miller*, 389 U. S. 429, we asked the Court of Appeals of the State of New York to apply the standards enunciated by this Court to Section 2218 of the Surrogate's Court Procedure Act of New York. The Court of Appeals declined to deal with the constitutional issue, although petitioners in their brief presented a comprehensive history of the manner in which the New York courts had applied Section 2218 of the Surrogate's Court Procedure Act of New York in contravention of the *Zschernig* decision. *Matter of Kina*, 23 N. Y. 2d 720. Previously, the Court of Appeals had decided that Section 2218 is constitutional on its face and that it was unable on the record then before it to find that the statute had been unconstitutionally applied. *Matter of Leikind*, 22 N. Y. 2d 346 (1968).

Petitioners have also presented the same constitutional issue to the New Jersey Supreme Court which found that State's benefit, use and control statute, patterned after the New York statute involved this case, to have been unconstitutionally applied by the New Jersey courts. *Matter of Kish*, 52 N. J. 454.

In the case at Bar, the Court below permitted petitioners to participate as *amicus curiae* both by brief and in the oral argument.

Your petitioners have sought the consent of the parties in this case for the filing of the attached brief. We have received the written consent of John R. Vintilla, Esq., attorney for the appellants, but Daniel M. Cohen, Esq., Assistant Attorney General, representing Louis J. Lefkowitz, Attorney General of the State of New York, informed us that his office would not consent.

Because the time element is short, we are attaching herewith our proposed brief, together with this Motion for Leave to File the Brief, and respectfully request that leave of this Court be granted and that the attached brief be filed in this case.

Dated, March 21, 1969.

Respectfully submitted,

WOLF POPPER ROSS WOLF & JONES
By MARTIN POPPER
Amicus Curiae

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AMICUS CURIAE BRIEF

I

Interest of *Amicus Curiae*

The interest of the *Amicus Curiae* in the subject matter of this case has been set forth in the Petition for Leave to file this *Amicus Curiae* Brief filed concurrently herewith and the statements set forth therein are incorporated herein by reference.

II

Argument

Both the Court below and the Court of Appeals of the State of New York in *Matter of Leikind*, 22 N. Y. 2d 346 (1968), have anticipated that this Court might hold that the New York statute herein involved is unconstitutional on its face.

The Court below read this Court's recent ruling denying a hearing in *Ioannou* v. *New York*, 391 U. S. 604 (1968) "as at least an indication that evidence of improper application of the statute is necessary". The Court of Appeals distinguished the New York statute from the Oregon statute involved in *Zschernig* on the grounds (a) that the New York statute does not contain an escheat provision

and (b) that the decision by this Court in *Zschernig* "in accepting the constitutionality of 'reciprocity' arguably accepted 'benefit, use or control' provisions as valid, provided State courts did no more than 'routinely read' foreign laws and provided there was no palpable interference with foreign relations in their application."

We respectfully submit that the reasoning of the Court below and the Court of Appeals misses the crucial point that the New York statute by its very nature and legislative history impels the State courts to engage in the conduct of foreign relations.

The law became effective in 1939 as Section 269 of the Surrogate's Court Act. There was included in the legislative bill which was subsequently enacted, an explanatory note setting forth the purpose of the amendment, as follows:

> "This amendment is proposed by the Executive Committee of the Surrogates' Association of the State of New York. The purpose of the amendment is to authorize the deposit of monies or property in the Surrogate's Court in cases where transmission of payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by compensation in whole or in part. The amendment authorizes the impounding of the fund by the Surrogate to await the time when payment can be made to the beneficiary for his own benefit, use and control." See Bill or Revision Notes to Section 269, Surrogate's Court Act in *Gilbert Bliss, Civil Practice of New York*, annot'd., Book 13B, p. 155.

Almost immediately after the enactment of Section 269 a Surrogate in New York made clear the judiciary's understanding of the legislative purpose of the statute in the following language:

> "It is a matter of *common knowledge* that private ownership of property has been abolished in the Soviet Union, with the result that none of its nationals there resident is permitted by its laws to

> have the personal control of any property, which is deemed to belong solely to the State. In other words, there is here presented the precise situation contemplated in the note to the amendment to Section 269 at the time of its enactment, to the remedy of which the law was passed that 'transmission or payment to a beneficiary, legatee or other person resident in a foreign country might be circumvented by confiscation in whole or in part.' So far as Russian nationals are concerned, such confiscation by and for the use of the government would be of the fund in its entirety and this is not altered by the indication in a current Congressional inquiry that it would be used by the agencies of the Soviet Government in this country to attempt to undermine our institutions and to sabotage our industries." *Estate of Landau*, 172 Misc. 651, 16 N. Y. S. 2d 3 (1939).*

In 1960, the law became Section 269-a of the Surrogate's Court Act and was amended to include a requirement imposing upon *alien* legatees the burden of proving that they would receive the benefit, use and control of monies which might be transmitted to them. The practical effect of this amendment was to provide legislative approval for the kind of hearings which had been conducted by the Surrogate's Courts for more than twenty years. This Court noted its disapproval of this type of State court conduct in *Zschernig*.

The suggestion made by the Court of Appeals in *Leikind*, *supra*, that a distinction might exist between the Oregon statute dealt with in *Zschernig* and the New York statute in this case, on the ground that the Oregon statute provides for escheat while the New York statute is custodial in nature, has since been answered by the opinion of Mr. Justice Douglas in *Ioannou* v. *New York*, *supra*, in which he stated that the rationale of the *Zschernig* decision applies to custodial statutes such as New Yorks' as well as to escheat statutes like Oregon's.

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* The legislative purpose of the statute was reconfirmed by the Court of Appeals in *Matter of Leikind*, *supra*.

Assuming, *arguendo*, however, that the Court below is correct in its view that *Ioannou* v. *New York*, *supra*, requires evidence of improper application of the statute before it will be found to be unconstitutional, there is ample evidence available that the New York courts have acted and continue to act in contravention of the principles of the *Zschernig* decision.

In our *Amicus* Brief below, we made a survey of the decisional history pertaining to the application of the statute by the New York courts which showed that on all levels from Surrogates' to the Court of Appeals, they have for a quarter of a century engaged in the conduct of foreign relations, often radiating cold war attitudes.

Curiously, although the Court below permitted our participation as *Amicus Curiae*, its opinion omits any reference to the many cases cited by us showing how the New York courts have applied the statute. Instead, it relied solely upon the factual allegations in the complaint as the basis for its finding that there was no record before it of unconstitutional application. But the real record is to be found in the decisions of the courts. In *Zschernig*, the Court found that the Oregon statute had been applied unconstitutionally not in the case before it but generally in many cases over many years.[1]

We anticipate that the Attorney General of the State of New York will argue that jurisdiction should not be noted in this case until the New York courts have had an opportunity to apply the guidelines set forth in *Zschernig* or, in other words, that the appellants should be required to go back to the Surrogate's Courts.[2]

But the fact is that since the decision in *Zschernig*, the Court of Appeals has not adopted a policy which might have caused the Surrogates to discontinue the practice of

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[1] In *Zschernig*, there had been no hearing in the Oregon State courts on the factual question of reciprocity.

[2] And this, despite the fact that almost eight years ago the State Department, ("In view of the foreign policy aspects of this matter . . ."), requested the Governor of New York to bring "to the attention of the appropriate authorities of your State", the Department's conclusion that legatees or distributees living in Romania have the benefit or use or control of such bequests. Letter of Legal Adviser to Governor Rockefeller, dated Nov. 9, 1961, judicially noted in *Matter of Greenberg*, 46 Misc. 2d 883, aff'd. 24 A. D. 2d 435, leave to appeal denied 17 N. Y. 2d 417.

Noted

conducting the kind of hearings which were proscribed in *Zschernig*. *Matter of Leikind* and *Matter of Kina*, *supra*. Such hearings are taking place at the present time.

It is our position, that it makes no difference whether the Court withholds transmission of the funds or permits its transmission. The question is whether, in the course of reaching its conclusion, the Court applies the statute in an unconstitutional manner. If, in order to make a finding, the Court insists upon conducting hearings which involve it deeply in the conduct of foreign relations, the statute has been applied unconstitutionally and has imposed unfair burdens upon the legatees affected.

Finally, we call the Court's attention to the fact that Section 2218 of the Surrogate's Court Procedure Act was amended again subsequent to this Court's decision in *Zschernig*. The following section was added:

> "1.(a) Where it shall appear that an alien legatee, distributee or beneficiary is domiciled or resident within a country to which checks or warrants drawn against funds of the United States may not be transmitted by reason of any executive order, regulation or similar determination of the United States government or any department or agency thereof, the court shall direct that the money or property to which such alien would otherwise be entitled shall be paid into court for the benefit of said alien or the person or persons who thereafter may appear to be entitled thereto. The money or property so paid into court shall be paid out only upon order of the surrogate or pursuant to the order or judgment of a court of competent jurisdiction.
>
> * * * "

The validity of this amendment was not argued in the Court below because its provisions do not affect the appellants in this case. Nevertheless, the Court quoted the entire statute, including the amendment.

During the argument of a motion before the United States District Court for the Southern District of New York, challenging the constitutionality of this amendment and requesting the convening of a three-judge court, the Assistant Attorney General of the State of New York took

the position that the Court below had found the entire statute constitutional. P. 18, Transcript of Argument of Motion for a Three-judge Court in *Bjarsch* v. *DiFalco*, U. S. D. C., S. D., 68 Civ. 4216 (Jan. 15, 1968), decision pending.

Petitioners contend that the amendment is unconstitutional not only under the *Zschernig* decision but because it violates the due process clause of the Fourteenth Amendment, in that it denies the persons affected by it the right to a hearing at which they might prove that they would have the benefit, use and control of their funds and upon such proof be entitled to receive them.

Conclusion

Because, despite the *Zschernig* decision, the New York courts continue, in cases involving foreign legatees and distributees residing in certain countries, to engage in the conduct of foreign relations counter to the exclusive power granted to the Federal government by the United States Constitution, we urge this Court to find that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

Wolf Popper Ross Wolf & Jones
By Martin Popper
Amicus Curiae